

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EVELYN CORTES and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

*Docket No. 01-2248; Submitted on the Record;
Issued November 20, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant met her burden of proof in establishing a recurrence of disability on February 16, 2000; (2) whether appellant established a recurrence of disability on July 5, 2000; (3) whether the Office of Workers' Compensation Programs met its burden of proof to reduce appellant's compensation benefits based on her actual earnings; and (4) whether the Office met its burden of proof to terminate appellant's compensation benefits effective November 4, 2000 on the grounds that she refused an offer of suitable work.

Appellant, a 30-year-old letter carrier, filed a notice of traumatic injury on August 2, 1989 alleging that she injured her back while in the performance of duty on that date. The Office accepted appellant's claim for lumbar sprain on August 28, 1989. Appellant returned to limited duty on September 15, 1989. She stopped work on September 18, 1989 and again on October 26, 1989. The Office entered appellant on the periodic rolls on January 18, 1990.

The employing establishment offered appellant a light-duty position as a letter carrier working four hours a day on January 21, 2000. Appellant accepted this position on January 31, 2000. By letter dated February 7, 2000, the employing establishment directed appellant to report for orientation on February 15, 2000 and to report to work on February 16, 2000. The employing establishment noted that appellant attended orientation but did not report to work until February 22, 2000.

Appellant filed a notice of recurrence of disability on February 24, 2000 alleging that on February 15, 2000 she sustained a recurrence of disability due to increased pain resulting from her travel to and from work on that date. In a letter dated May 24, 2000, the Office requested additional factual and medical evidence regarding appellant's alleged recurrence of disability.

By decision dated May 24, 2000, the Office reduced appellant's compensation benefits effective March 26, 2000 based on her actual earnings of \$379.94 in the light-duty position of letter carrier. The Office found that appellant held this position from February 15, 2000.

In a decision dated June 26, 2000, the Office denied appellant's claim for recurrence of disability on February 15, 2000 finding that the medical evidence did not established that appellant was totally disabled due to her accepted employment injuries.

The employing establishment offered appellant a light-duty position on July 17, 2000 working eight hours a day. In a letter dated July 18, 2000, the Office informed appellant that it found the offered position suitable, informed her of the penalty provisions of the Federal Employees' Compensation Act and granted her 30 days to accept the position or to offer her reasons for refusal. Appellant's attorney responded on August 8, 2000. In a letter dated August 22, 2000, the Office informed appellant that her reasons for refusing the position were not acceptable and allowed her 15 days to accept the offered light-duty position.

Appellant filed a claim for recurrence of disability on July 31, 2000 alleging that she developed a recurrence of total disability on July 5, 2000. In a letter dated August 22, 2000, the Office requested additional factual and medical evidence in support of appellant's claim for recurrence of total disability. By decision dated September 28, 2000, the Office denied appellant's claim for recurrence of disability on July 5, 2000.

In a letter dated September 28, 2000, the Office proposed to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work. By decision dated November 3, 2000, the Office terminated appellant's compensation benefits effective November 4, 2000.

Appellant requested reconsideration of the Office's decisions on February 26, 2001 submitting additional medical evidence and argument. By decision dated June 4, 2001, the Office denied modification of its prior decisions.

The Board finds that appellant failed to meet her burden of proof in establishing a recurrence of disability on February 15, 2000 causally related to her accepted employment injury.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.¹ The Office's procedures require that in cases where recurrent disability for work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability for work.²

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a)(b) (January 1995).

Appellant accepted a limited-duty job offer on January 31, 2000 and reported to the employing establishment on February 15, 2000 for orientation. She then filed a claim for recurrence of disability beginning on that date alleging that as a result of the commute from her home to the employing establishment and back she sustained a recurrence of total disability from February 16 through February 22, 2000.

In support of her claim, appellant submitted medical evidence from her attending physician, Dr. Robert L. Sperry, a Board-certified orthopedic surgeon, including a work release note dated February 18, 2000 which stated that appellant was incapable of working until February 22, 2000 due to intense cervical and lumbar pain. On February 27, 2000 Dr. David L. Zonderman, an osteopath, stated that appellant should remain out of work February 16, 17 and 18, 2000 due to chronic back pain and cervical radiculopathy. These notes are not sufficient to establish a change in the nature and extent of appellant's employment-related condition. Neither Dr. Sperry nor Dr. Zonderman provided objective physical findings in support of their conclusion of total disability.

In a report dated March 3, 2000, Dr. Sperry noted appellant's history of employment injury and diagnosed chronic cervical and lumbar pain syndromes and a herniated disc in the cervical spine. He stated that appellant's work restrictions included four hours a day in a facility near her home. Dr. Sperry stated that appellant's current position required her to ride the bus, walk and take the subway for a total commute of one and a half hours one way. He stated that appellant's return trip was longer lasting for 2 hours and 15 minutes. Dr. Sperry concluded that appellant's commute was too strenuous for her and had resulted in increased pain requiring narcotic medication to control. He recommended that appellant be immediately relieved of the necessity to make this "long and difficult commute" and that unless work was found near her home she was totally disabled. This report is not sufficient to meet appellant's burden of proof as Dr. Sperry did not attribute her condition to her accepted strains, but rather to the additional conditions of chronic cervical and lumbar pain syndromes. Dr. Sperry did not provide the objective physical findings upon which he based this diagnosis and did not provide any medical rationale explaining how and why appellant's accepted employment injuries resulted in the new diagnoses. As Dr. Sperry did not provide objective medical findings in support of his conclusion of total disability, his report is not sufficient to meet appellant's burden of proof.

Due to a conflict in medical opinion between Dr. Sperry and an Office referral physician regarding the extent of appellant's disability, the Office referred appellant to Dr. William S. Giliberti, a Board-certified orthopedic surgeon, for an impartial medical examination. In his March 13, 2000, report, Dr. Giliberti found that appellant had no significant objective findings nor imaging tests nor electrodiagnostic tests to support her subjective complaints. As Dr. Giliberti found no employment residuals, this report does not support that appellant sustained a worsening of her accepted employment conditions following her February 15, 2000 return to work and resulting commute.

In a report dated March 23, 2000, Dr. Sperry stated that appellant was experiencing physical and emotional difficulties as a result of her commute. He reiterated that appellant could not work four hours a day in addition to this commute and that she required employment close to

her home. Dr. Sperry recommended additional physical and psychological treatment.³ This report does not provide the necessary objective physical findings nor any medical rationale explaining how and why appellant developed “physical and emotional difficulties” following her return to work. Therefore this report is not sufficient to meet appellant’s burden of proof.

In a report dated June 5, 2000, Dr. Sperry stated that appellant’s complaints remained unchanged and that she could not tolerate the lengthy commute to and from her job. He stated that he would not submit additional narrative reports. This report also fails to provide any objective medical findings in support of appellant’s claim for total disability. As the medical evidence does not establish that appellant experienced a change in the nature and extent of her injury-related condition, she has not established that she sustained a recurrence of disability on February 15, 2000.

The Board further finds that appellant failed to meet her burden of proof in establish that she sustained a recurrence of total disability on July 5, 2000.

Appellant has the burden of proof in establishing a change in the nature and extent of her employment-related condition beginning on the date of the claimed recurrence of total disability, July 5, 2000. In support of her claim for total disability beginning July 5, 2000, she merely submitted a factual statement alleging that she was unable to work due to a spontaneous return of the symptoms of the previous injury without cause. Appellant did not submit any medical evidence addressing her alleged recurrence of disability. As there is no medical evidence in support of appellant’s claim for a recurrence of total disability on July 5, 2000, the Office properly denied her claim.

The Board further finds that the Office met its burden of proof to reduce appellant’s compensation benefits based on her actual earnings in the position of modified carrier.

Section 8115 of the Act,⁴ titled “Determination of wage-earning capacity,” states in pertinent part, “In determining compensation for partial disability, ... the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity....” Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee’s wage-earning capacity, must be accepted as such measure.⁵

Appellant’s attorney argued that the position of light-duty letter carrier did not represent appellant’s wage-earning capacity as she was not capable of performing the duties of this position due to her employment injuries. Appellant worked as a letter carrier from February 22

³ The Board notes that the Office has not issued a final decision addressing the causal relationship between any psychological condition and appellant’s employment. Therefore, the Board will not address this issue on appeal. 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. § 8115.

⁵ *Elbert Hicks*, 49 ECAB 283, 284 (1998).

through May 24, 2000, the date of the Office's decision.⁶ Appellant's performance of this position for 90 days is persuasive evidence that it represents her wage-earning capacity.⁷ There is no evidence that this position is seasonal, temporary, less than full-time, make-shift work designed for appellant's particular needs.⁸ At the time the Office issued its decision, appellant had not stopped performing this position because of a change in her injury-related condition affecting her ability to work. As noted above, appellant has not met her burden of proof in establishing her alleged recurrences of total disability on February 15 and July 5, 2000. The medical evidence is not sufficient to establish that the position was beyond appellant's physical capacity. The Board therefore finds that the Office properly determined appellant's wage-earning capacity was represented by her actual earnings as a letter carrier beginning February 22, 2000.

The Board further finds that the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁹ As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Act¹⁰ provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.517 of the applicable regulations¹¹ provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.¹²

Dr. Sperry completed a work restriction evaluation on December 21, 1998 and indicated that appellant could work six hours a day with restrictions. He stated that appellant should be

⁶ Appellant continued to work in this position until her alleged recurrence of disability on July 5, 2000.

⁷ Office procedures provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.8.14.7(c) (December 1993).

⁸ *Monique L. Love*, 48 ECAB 378 (1997).

⁹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

¹⁰ 5 U.S.C. § 8106(c)(2).

¹¹ 20 C.F.R. § 10.517(a).

¹² *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

assigned to an office facility close to her present address. He indicated that she could sit, stand, walk and operate a motor vehicle for six hours intermittently.

The Office referred appellant for a second opinion evaluation with Dr. Philip K. Keats, a Board-certified orthopedic surgeon. In his September 17, 1999 report, Dr. Keats noted appellant's history of injury and performed a physical examination. He stated that appellant had findings which were secondary to pain rather than to significant pathology that could be causally related to the August 2, 1989 employment injury. Dr. Keats diagnosed chronic pain syndrome with multiple subjective complaints and findings on examination that are primarily subjective in nature based on pain and out of proportion to the actual pathology demonstrated on diagnostic testing. He stated that the accepted conditions of lumbar sprain and right dorsal sprain were mild soft tissue injuries which would have resolved within six to eight weeks of the time of injury. Dr. Keats opined that appellant had a prior lumbar spine condition of herniated disc that required surgery and that she had sustained a permanent aggravation of preexisting lumbar spine condition. He concluded that appellant could not return to her date-of-injury position but that appellant could work four hours a day with restrictions. He did not recommend further medical care. In a supplemental report dated December 23, 1999, Dr. Keats stated: "In my opinion there is no medical basis for any restriction of commuting to work by public transportation or car. There is no medical basis for any restriction as to how long the commute can or should be."

Due to the conflict of opinion between appellant's attending physician, Dr. Sperry, who supported appellant's continued partial disability for work, and the Office referral physician, Dr. Keats, who found that the accepted conditions should have resolved and no objective findings in support of appellant's complaints, the Office referred appellant for an impartial medical examination by Dr. Giliberti, a Board-certified orthopedic surgeon.

Dr. Giliberti completed a report on March 13, 2000 noting appellant's history of injury and medical history. He reviewed her diagnostic testing. Appellant reported that her current difficulty was with her commute to work which caused severe back pain due to the bumpy bus ride to and from work. She provided a report from Dr. Sperry addressing this issue. On physical examination, Dr. Giliberti found no evidence of muscle spasm in appellant's spine, full passive motion of the cervical spine and greater lumbar motion limitations during examination than those demonstrated independently, *i.e.*, getting on and off the examining table and out of a chair. He found symmetrical muscular development and normal neurological examination. Dr. Giliberti diagnosed cervical spine sprain on August 2, 1989, chronic cervical pain syndrome, post-lumbar disc surgery in 1984 with degenerative L4-5 and L5-S1 disc and chronic lumbar spine pain syndrome. He reviewed diagnostic studies and concluded that appellant's cervical and lumbar conditions were part of an ongoing degenerative process and not due to her August 2, 1989 employment injury. Dr. Giliberti stated that appellant's chronic pain syndromes could not be explained on any physical basis given her minimal physical findings and the lack of physical basis demonstrated on imaging tests and electrodiagnostic studies. He stated that appellant's sprains should have resolved within weeks following her employment injury in 1989. Dr. Giliberti found no physical evidence of disability. However, he provided restrictions of no lifting, pulling or pushing more than five pounds for more than one hour a day. He also precluded squatting, kneeling and climbing and placed limitations on lifting or reaching above shoulder level. Dr. Giliberti indicated that appellant could walk and reach for two hours and that she could stand for four hours. He stated that appellant was capable of full-time work.

Dr. Giliberti concluded that appellant did not require further medical treatment or physical therapy.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹³ Dr. Giliberti provided a detailed report based on a proper factual background. He included detailed findings on physical examination and concluded that appellant had no objective physical findings preventing her from working eight hours a day nor physical basis for her complaints of pain. Given the extensive nature of Dr. Giliberti's physical examination of appellant, his review of the diagnostic studies and his medical reasoning in support of his conclusion that there was no physical basis for her complaints, his report is entitled to special weight and is sufficient to establish that appellant can work eight hours a day with restrictions. Furthermore, although Dr. Giliberti did not directly address the issue of appellant's ability to commute to and from the employing establishment in his conclusions, he noted appellant's statement regarding difficulty of her commute as well as the report from Dr. Sperry, and concluded that appellant was capable of performing full-time work as she had no employment-related condition and no objective findings supporting disability or medical restrictions.

The employing establishment offered appellant a light-duty position of letter carrier on July 17, 2000. This position required intermittent reaching above the shoulder and twisting, no lifting pushing or pulling over 5 pounds for up to 1 hour a day; no squatting, kneeling or climbing; standing for up to 4 hours; sitting for up to 8 hours, walking and reaching to 2 hours, and 2 breaks of 10 minute breaks duration every 2 hours. This position strictly complied with appellant's work restrictions.

The Office properly found that this position was suitable as it complied with the work restrictions determined by Dr. Giliberti, the impartial medical specialist. The Office provided appellant with the appropriate notices. Appellant's attorney responded on August 8, 2000 and stated that any termination of benefits based on the offered position would be contrary to the medical evidence in the record and the Act. Appellant did not submit any additional medical or factual evidence in support of her decision to refuse the offered position.

The Board finds that the weight of the medical evidence as represented by the well-rationalized report of Dr. Giliberti establishes that the offered position was suitable, appellant did not offer any reasonable explanation of her refusal to accept the position, therefore, the Office met its burden of proof to terminate appellant's compensation benefits effective November 4, 2000.

Following the Office's November 4, 2000 decision, appellant requested reconsideration and submitted a report dated November 9, 2000 from Dr. Sperry. He noted appellant's history of injury and reviewed his treatment notes. Dr. Sperry opined that appellant's lumbar degenerative disc disease and facet arthritis were causally related to her 1983 lumbar spine injury. He stated that appellant had developed a chronic pain syndrome resulting from the degenerative process

¹³ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

existing in the lumbosacral spine. Dr. Sperry stated that the August 2, 1989 injury led to the development of a chronic pain syndrome relative to the cervical spine and right shoulder. He explained that he believed that appellant's 1989 employment injury resulted in a herniated disc at the C5-6 level demonstrated on a 1990 magnetic resonance imaging (MRI) scan which was partially reabsorbed by the time of the 1998 MRI scan leading to the finding of a disc bulge at C5-6. Dr. Sperry stated that appellant's electromyograms (EMG) in 1990 and 1998 supported this conclusion as the 1990 EMG supported a derangement of the sixth cervical root. He stated, "[T]he duration of the involvement of the sixth cervical root can produce a derangement of neurological and sensory and brain function to bring on a chronic pain syndrome, referable to the right shoulder and upper level of the right arm." Dr. Sperry stated that this chronic cerebral dysfunction could manifest itself by chronic and frequently recurring episodes of headache. He concluded, "Cerebral function is complex and incompletely understood, but the assignment of a chronic headache to a chronic brain pain syndrome is both feasible and realistic." Dr. Sperry further noted that appellant required varying types of medication to control her pain. He recommended treatment by both a psychologist and a pain management specialist.

While Dr. Sperry offered an explanation for his conclusion that appellant's chronic pain syndrome was causally related to her accepted employment injuries, he did not provide any objective findings in support of his conclusion. He noted that appellant had normal findings in 1998 on both her EMG and her MRI scan. While Dr. Sperry explained how appellant's MRI improved from 1990, he did not fully explain the lack of findings on appellant's 1998 EMG. He stated that the duration of the involvement of the C6 nerve root could cause her chronic pain syndrome without providing any findings to support what the duration of the involvement of the nerve root was and without explaining what he believed the appropriate amount of time of involvement necessary to result in a chronic pain syndrome.

Dr. Giliberti reviewed the diagnostic tests including the MRIs and EMGs discussed by Dr. Sperry and reached the opposite conclusion, that appellant had degenerative disc disease which was not related to her employment injuries and that she had no objective physical findings to explain her chronic pain syndrome. As Dr. Sperry was on one side of the conflict that Dr. Giliberti resolved, the additional report from Dr. Sperry is insufficient to overcome the weight accorded Dr. Giliberti's report as the impartial medical specialist or to create a new conflict with it.¹⁴ The weight of the medical evidence as represented by Dr. Giliberti's well-rationalized report establishes that appellant has no continuing condition causally related to her accepted employment injuries.

¹⁴ *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

The June 4, 2001, November 3 and September 28, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 20, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member